

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,100

HORTEN J. M. MELARO

Appellant

v.

MATTHEW N. MEZZANOTTE

and

MEZZANOTTE & COMPANY

and

FORT WASHINGTON ESTATES, INC.

Appellees

984

*On Appeal From the United States District
Court for the District of Columbia*

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 25 1965

Nathan J. Paulson
CLERK

B. AUSTIN NEWTON

WESLEY E. McDONALD

**815 15th Street, N.W.
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Attorneys for Appellant

(i)

APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

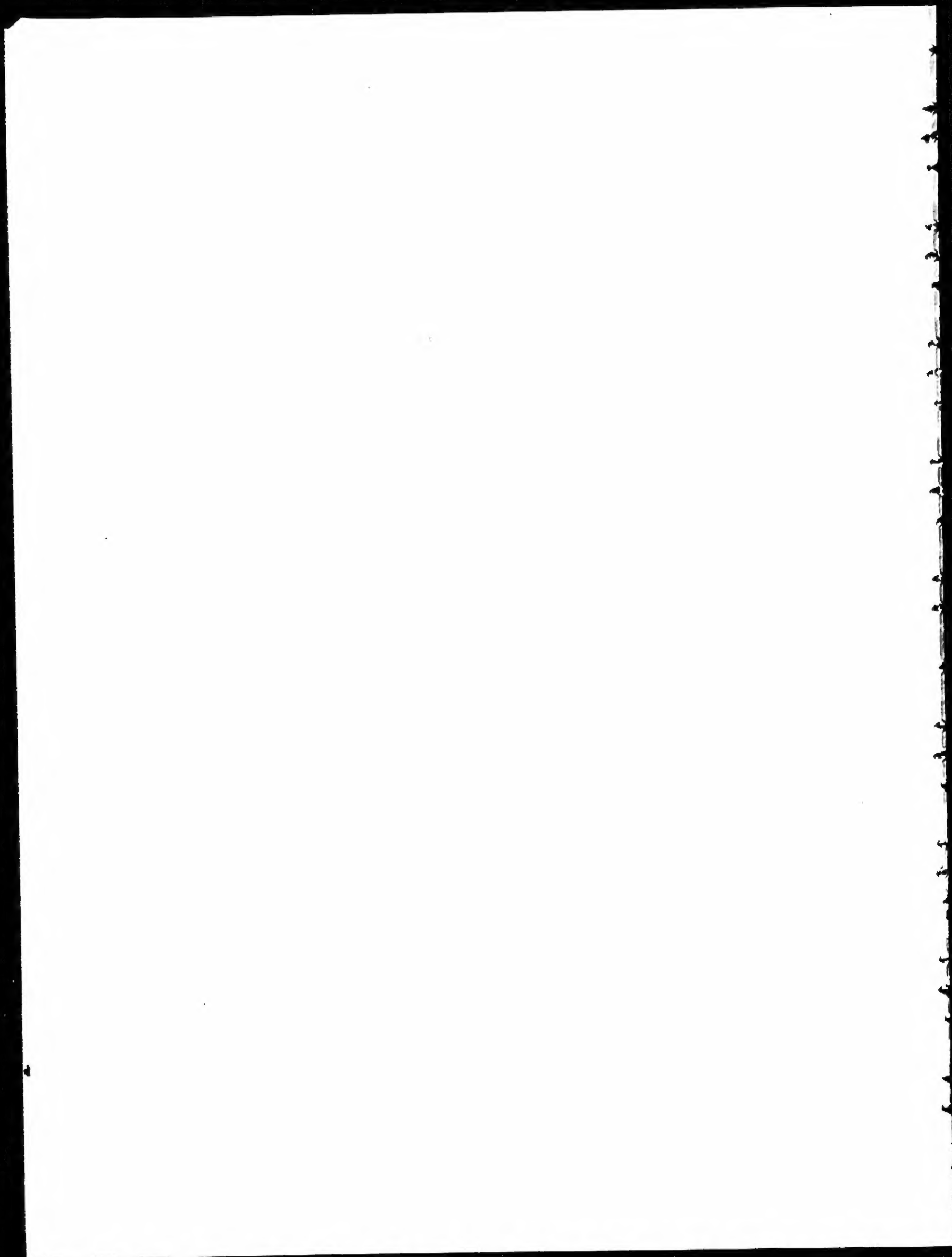
The question is whether an action filed in the United States District Court (where personal service of process could be obtained upon the defendants) for breach of contract for alleged failure to convey real estate under the terms thereof is res judicata by virtue of an action filed on the equity side of the Court in a common law jurisdiction, the State of Maryland, seeking specific performance of that contract when such Bill in Equity was dismissed on demurrer for the sole reason that the Court found that the complainant had an adequate remedy at law for damages for breach of contract.

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United States Court of Appeals

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No. 19,100

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Appellant

v.

MATTHEW N. MEZZANOTTE

and

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FORT WASHINGTON ESTATES, INC.

Appellees

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the United States District Court for the District of Columbia, hereinafter called the Court below, from a final order dismissing the complaint on October 26, 1964, upon defendant's motion to dismiss (J.A. 4). A notice of appeal was duly filed on

November 25, 1964 (J.A. 10). This Court has jurisdiction under 28 U.S.C., Section 1291, to review the proceeding and records herein. The Court below had jurisdiction under the District of Columbia Code, Title 11-306 (1961 Ed.).

STATEMENT OF THE CASE

In the fall of the year 1957 the Complainant (Appellant) entered into a contract in the District of Columbia with the Appellees to purchase a certain tract of land in a subdivision in Prince George's County, Maryland. Under the terms of the contract the appellant was to make monthly payments to the Corporate Appellee, Fort Washington Estates, Inc. while he was overseas on military assignment until his return to the United States in September 1961, at which time he was to make other payment and also at which time the land in question was to be conveyed to him. For many months the appellant made the payments under the terms of the contract and the same was received by the Corporate Appellees and credited to his account specifically marked for the lot in question which was designated by number. There came a time when the appellees constructed on said property an "elaborate marina" and commenced returning the appellant's payments made under terms of the contract. The appellant gave notice that he considered this a breach of the contract and continued each month to tender his checks under the terms thereof. On the appellant's return to the United States he went into the Equity Court of the Circuit Court of Prince Georges County, Maryland, and filed a Bill in Equity seeking specific performance of his contract. A demurrer was filed to the bill and when the demurrer came on for hearing the bill was dismissed for the sole reason that it did not (and in the Court's opinion could not) show that the complainant did not have an adequate remedy in law for damages for breach of contract. The appellant thereupon pursued the remedy at law by filing a complaint in the United States District Court for breach of contract where he believed he could best obtain personal service of process upon the defendants. (J.A. 1).

On the 18th day of September, 1964, the appellees filed a Motion to Dismiss on the sole ground that appellant's former Equity #B-8678 in Maryland made the complaint filed in the Court below res adjudicata. (J.A. 3). The motion came on to be heard on the defendant's motion and the opposition filed thereto and by order of October 26, 1964, the Court granted the motion dismissing the complaint on the stated and sole ground that the matter was res judicata by virtue of the Maryland Equity Bill. (J.A. 10).

STATEMENT OF POINTS

The ruling of the Court below was erroneous in that it held on the Motion to Dismiss that the appellant's action was res judicata because he had filed an action in the Equity Court in Maryland seeking specific performance under a contract which the appellees had breached and which action had been dismissed on demurrer. The Court finding that the Bill in Equity did not show that the complainant was without an adequate remedy at law for damages.

SUMMARY OF ARGUMENT

One of the basic and essentials necessary to constitute "res judicata" is identity in the thing sued for, here identity in the cause of action. When the Equity Court in the Common Law Jurisdiction of Maryland considered the merits of the allegations contained in the Bill in Equity For Specific Performance and for purposes of the demurrer found them to be as alleged, said Court likewise found that specific performance would not lie. That Court held from the merits an adequate remedy existed in law. Such finding was tantamount to a direction to the Complainant (Appellant) that he could file the very action for damages that was filed in the Court below, a suit for damages in a jurisdiction contemplated to provide personal service of process upon the defendants.

ARGUMENT

Appellant's argument that the Court erred in holding his action for damages for breach of contract was res judicata is believed to be rather succinct and need not be long labored. The appellant wanted the land that he had contracted for and on refusal of appellees, or certain of them, to convey the same, he asked a Court of Equity to compel compliance. This lot was situated in the State of Maryland and only a Court in that State could have given the appellant the relief that he really wanted. The alternative, by way of relief, would be damages for the appellees' breach of the contract. This lesser desired relief could not be sought in the same action for specific performance because of the division of the Maryland Court, the Equity side on the one hand and the Law side on the other. Therefore, the complainant was relegated to seeking first that which he desired most, specific performance, and if the law of the jurisdiction prohibited recovery under the rule that an adequate remedy existed at law (a position that the complainant did not believe to be correct) then he must pursue the remedy at law for damages. Moreover complainant (appellant) faced the dilemma of service of process on all defendants, and while such service was not important in the action to compel conveyance, it became all important in a damage action as to which of the responsible parties was also financially responsible. If the parcel had been situated in the District of Columbia the matter could have been disposed of in a single action asking for equitable relief on the one hand and alternatively for damages. However, certainly the fact the appellant had to seek his equitable relief in another state where he could not in the same action seek damages should not estop him from turning to the very type of relief that the equity court found was open to him when equity failed. From the foregoing it would seem that this was not such an unusual situation and in fact this Court found an almost identical occurrence in *Trask v. Kar-rick*, 56 App. D.C., 10 F.2d 995, 1926. This language, found on Page 131, would seem to control this entire question.

"It appears that, after the aforesaid judgment was entered by the Massachusetts court, the appellee commenced a suit in equity in the state of Massachusetts, seeking an injunction to restrain the appellant from proceeding with its collection. A demurrer to the bill was filed by appellant, upon the ground that the allegations of the bill failed to show that the appellee was entitled to any relief in equity, but showed that he had a complete and adequate remedy at law. The court sustained the demurrer and dismissed the bill. The appellant contends that this was an adjudication of the present claims of the appellee, and that the latter is foreclosed from litigating them again in this case. This point is not well taken, for it is an established rule that where a demurrer to a bill is sustained upon the ground that the complainant has an adequate remedy at law, it is no bar to an action or defense at law by the party upon the same facts. 2 Van Fleet's Former Adjudication, 568, 660; 1 Herman Estoppel and Res Judicata, 404; Lessee of John Lore, 10 Ohio St. 45."

The appellees in their motion below accused the appellant of splitting or re-litigating the same cause of action. But, this cannot be the case when the complainant could not seek remedies that were not open to him in a single action in Maryland where the property was located. Again, this Court has pointed this very matter up in *Tribby v. O'Neal*, 39 App. D.C. 467, by stating on page 470:

"Appellee could not have proceeded in trover, where she could have recovered the value of the piano, and then have brought an action in trespass to recover vindictive damages, for she could have recovered both in trespass. For the same reason it will not be urged that she could have been compelled to adopt replevin, and lose her right to vindictive damages. The judgment in one suit will be a bar to another suit only when a remedy exists which insures the same relief sought in the two separate actions. Applying this test to the

case at bar, the remedy pursued by appellee in the former suit was not *res judicata* of the present action. The sole object of the statute is to relieve persons in the situation of the appellee. The remedy is not one for restoration of possession and damages, but for the former alone. We are of opinion that if she desired to invoke the remedy furnished by the statute, and subsequently to sue in tort for damages sustained, she was not splitting a single cause of action."

The question in one respect is like that found in *Van Horst v. Thompson*, 57 App. D.C. 135, 18 F.2d 177, 1927. There the plaintiffs had pursued relief in the nature of having decreed their alleged interest in certain real estate in the District of Columbia. They had previously pursued such relief concerning interest in other real estate located in the State of Iowa. On page 138 the Court made this observation:

"Summed up, the claim of appellants is this: That it was the duty of Mrs. Partello to litigate in Iowa her title to land not within the jurisdiction of that court, and whose judgment and decree in her favor as to such land would be inoperative to vest title thereto in her, failing which she is estopped in this suit. We are clear that such is not the law. She was strictly within her rights in proceeding as she did in the Iowa court.

"As was said in *Cromwell v. County of Sac*, 94 U.S. 351, 24 L. Ed. 195, where estoppel of a judgment was claimed, ' * * * the inquiry must always be (limited) as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.'

"It is contended that the rule that a party cannot split his action and bring separate suits for different parts of the same demand is applicable here. This court in *Tribby v. O'Neal*, 39 App. D.C. 467, speaking of that rule said: 'The test, we think, is whether the remedies pursued in two or more suits could have been included in one.' "

In fairness to the motion court, confusion may have arisen in an actual query made by the court to appellant's counsel as follows: (J.A. 8).

"THE COURT: Was this a final disposition of the case in Prince Georges County?

MR. NEWTON: It was a final disposition of the case for specific performance only, Your Honor.

THE COURT: And is it considered a disposition on the merits?

MR. NEWTON: On the merits of that cause of action only."

From this colloquy the Court may have felt that the Equity Court in Maryland had actually weighed the merits of the controversy and felt them lacking insofar as the appellant is concerned. This would not only overlook the remainder of the record which shows the matter was disposed of on demurrer but would also overlook the fact that the Equity Court had specifically dismissed because of its finding that there was an adequate remedy in law. In the sense that the merits of the case were all to the complainant's claim for purposes of the demurrer, the Court did consider such merits. However, a decision dismissing a complaint for lack of jurisdiction (no right to proceed in equity here) is not res judicata to the substantive merits of the complainant in a proper action or to state it in the words of this Court in *Tyler Gas Service Company v. Federal Power Commission*, 101 U.S. App. D.C. 184, 188, 247 F.2d 590, 1957, cert. denied 355 U.S. 895:

"There is no occasion for lengthy comment as to our conclusion on the second question before us. A decision dismissing a complaint for lack of jurisdiction cannot be res judicata as to the substantive merits of the complaint. *Hughes v. United States*, 1866, 4 Wall. 232, 71 U.S. 232, 18 L.Ed. 303."

Also see: *Spilker v. Hankin*, 88 App. D.C. 206 at 211, 188 F.2d 35:

"In any event, it is for the plaintiff here — the person seeking the benefit of the doctrine of res judicata to sustain the burden of showing that all of the issues were determined in his favor in the earlier action."

The reasoning in appellant's position is also to be found in the following cases from other jurisdictions:

June v. George C. Peterson Company, 155 F.2d 963 at 965 and 966:

"The judgment in a former action which sought an injunction to restrain the sale of pledged stock was not 'res judicata' of present action seeking damages for a sale of pledged stock since the causes of action are different."

Merrill v. City of Wheaton, 41 N.E. 2d 508 at 511, 379 Ill. 504:

"The decree in an injunction proceeding is not 'res judicata' on the question of damages in a subsequent damage action between the same parties, where no question of damages had been involved in the injunction proceedings."

Palmer v. Clarksdale Hospital, 57 So. 2d 476 at 478 — 213 Miss. 611:

"Essentials necessary to constitute 'res judicata' are identity in the thing sued for, identity in the cause of action, identity of the quality of the persons for or against whom the claim is made."

CONCLUSION

It is respectfully submitted that it was error to have dismissed appellant's complaint as res judicata because of the prior dismissal of the Bill in Equity in the Circuit Court of Prince Georges County, Maryland, and that appellant should have the opportunity to prove the allegations of his complaint alleging breach of contract and the damages he sustained as a result thereof.

Respectfully submitted,

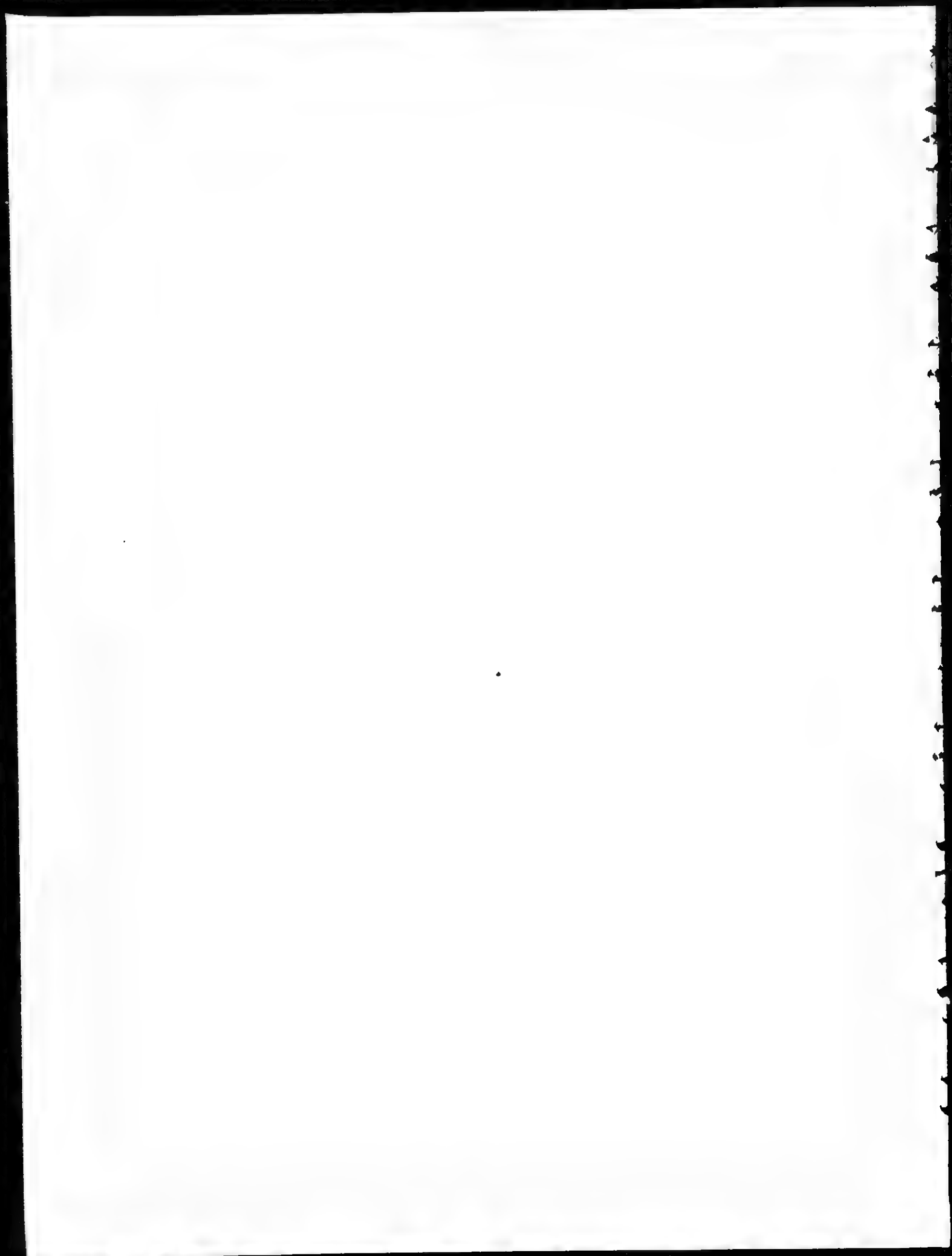
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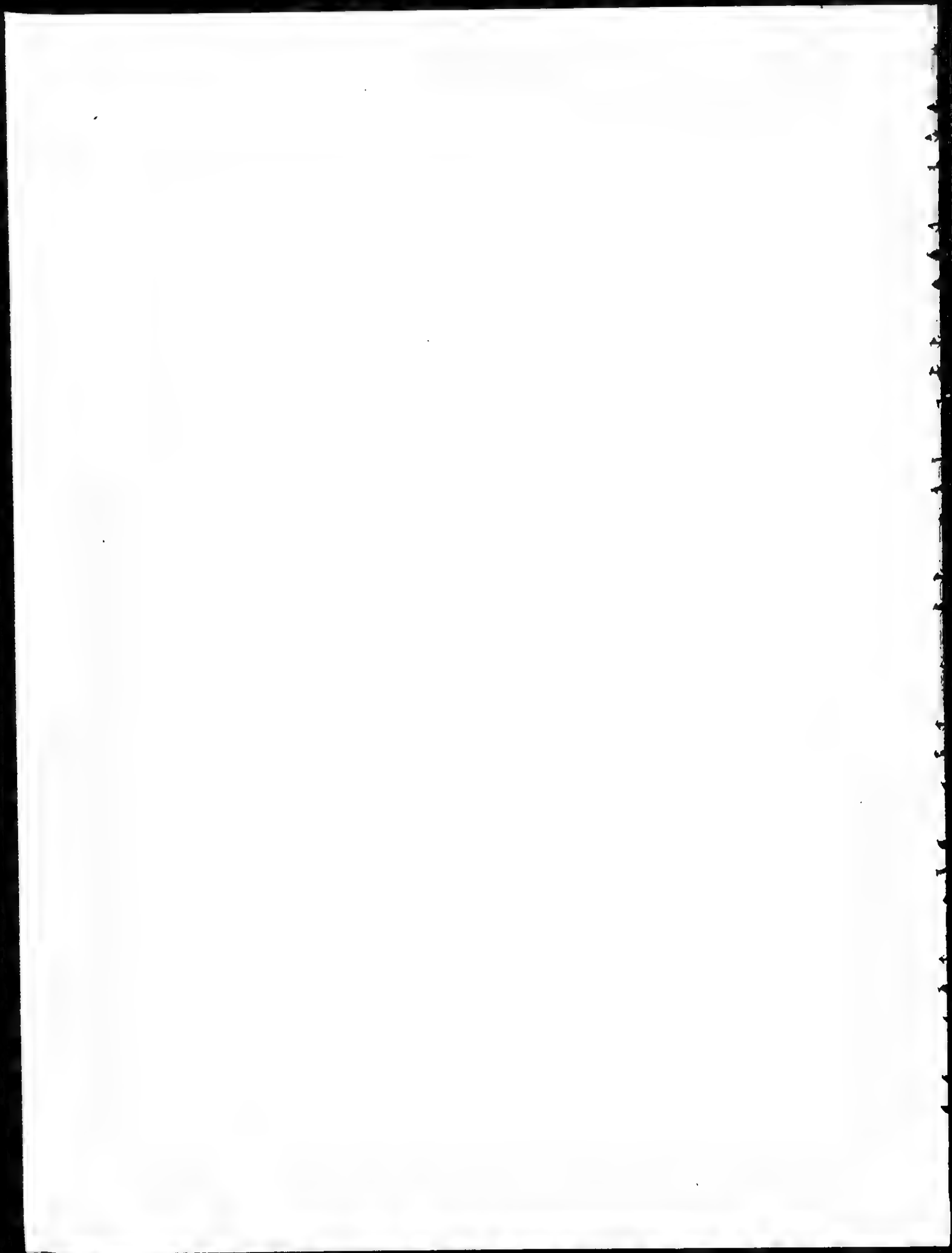
Washington, D. C.

Attorneys for Appellant



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JOINT APPENDIX

UNITED STATES DISTRICT COURT
For the District of Columbia
Civil Division

Horten J. M. Melaro
1400 South Joy Street
Arlington, Virginia,
Plaintiff,

vs.

Mathew M. Mezzanotte
1526 Connecticut Avenue, N.W.
Washington, D.C.,

and

Mezzanotte & Company
1526 Connecticut Avenue, N.W.
Washington, D.C.,

and

Fort Washington Estates, Inc.
c/o Mathew N. Mezzanotte
1526 Connecticut Avenue, N.W.
Washington, D.C.

Defendants.

Civil Action No. 2136-64

[Filed August 31, 1964]

COMPLAINT FOR DAMAGES

Comes now the plaintiff, Horten J. M. Melaro, through counsel,
and represents to this Honorable Court as follows:

1. This Court has jurisdiction of this cause in that the matter in
controversy involves residents of the District of Columbia, and the
claim for damages is in excess of \$10,000.00.

2. Plaintiff is an adult citizen of the United States, a resident of
the State of Virginia, a Major in the United States Air Force, and
brings this suit in his own right.

3. Defendant Mathew N. Mezzanotte is an adult citizen of the United States, and an officer of Mezzanotte & Company, a real estate organization operating and doing business in the District of Columbia.

4. Defendant Mezzanotte & Company is a body corporate doing business in the District of Columbia as a real estate organization.

5. Defendant Fort Washington Estates, Inc. is a body corporate organized to improve and develop certain lands in the State of Maryland, said corporation having operated through the defendants Mathew N. Mezzanotte and Mezzanotte & Company in the District of Columbia, and defendant Fort Washington Estates, Inc. having entered into contracts through its agents within the District of Columbia.

6. In the fall of the year 1957, plaintiff entered into a contract in the District of Columbia with the defendants to purchase Lot 74-D from the Fort Washington Estates, for a price of \$10,000.00, said agreement to purchase Lot 74-D having been made by the agents of defendants Mathew N. Mezzanotte, and Mezzanotte & Company, who were, at that time, owners of or in control of defendant Fort Washington Estates, Inc.

7. The aforementioned contract took the form of letters and other memoranda, and under the terms thereof, plaintiff was to make payments of \$25.00 per month to defendant Fort Washington Estates, Inc. Under the terms of the contract, plaintiff was to make the monthly payments of \$25.00 to Fort Washington Estates, Inc., until he returned from service overseas, at which time "substantial down payment" was to be made to defendant Fort Washington Estates, Inc., at which time the property was to be conveyed to plaintiff.

8. In compliance with the contract, plaintiff made the payments provided for therein, until he returned to the United States from overseas assignment in September of 1961. Upon his return, plaintiff attempted to comply with the contract and make such payment under

the terms thereof as the defendants demanded of him. However, when plaintiff made inquiry about fulfilling this contract, he discovered that defendants, through their agents, had caused or permitted to be erected on the lot in question a marina, and plaintiff was told that such lot was not available to him, and at that time defendants breached the contract.

9. Plaintiff continued to make payments under the contract, all of which were accepted, and retained by the defendant corporation for a long period of time. Plaintiff continued to make demand and to take all steps possible to have said Lot 74-D in the Fort Washington Estates conveyed to him. Defendants have, through the years, breached the aforementioned contract by their refusal to comply with the terms thereof.

10. Because of increment in value, and because of plaintiff's inability to develop the lot in question, and further because of the uses made thereon by the defendants, or defendant, the plaintiff has been damaged to the extent of \$50,000.00.

WHEREFORE, these premises considered, plaintiff demands judgment for \$50,000.00, and the costs of this action.

B. Austin Newton, Jr.
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

B. Austin Newton, Jr.
Attorney for Plaintiff

[Filed September 18, 1964]

MOTION TO DISMISS

Comes now the Defendant, Fort Washington Estates, Inc., by and through its attorney, Reuben Bonnett, and moves this Honorable Court to dismiss the above-entitled cause and for reasons therefor, states as follows:

1. The plaintiff fails to state a cause of action upon which relief can be granted.
2. That the plaintiff filed the identical suit against the defendant in the Circuit Court of Prince Georges County, Maryland, known as Equity No. B-8678; that the defendant in that case filed a Motion to Dismiss against the plaintiff, which motion was sustained; that the plaintiff entered an appeal and that this appeal was dismissed on the 30th day of January, 1963, in the Circuit Court of Prince Georges County, Maryland, and that, therefore, this matter is res adjudicata.
3. And for such other and further reasons as will be urged upon the hearing of this motion.

/s/ Reuben Bonnett, Esq.
Attorney for Defendant

[Certificate of Service dated September 18, 1964]

[Filed September 25, 1964]

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Comes now the plaintiff in opposition to the Motion To Dismiss filed by defendant Fort Washington Estates, Inc., through counsel, and states:

1. The complaint does state a cause of action for breach of contract, the defendant's agents having contracted to sell to the plaintiff a parcel of land and subsequently conveying the land to other parties.

2. There is no merit in this defendant's contention that this matter is res adjudicata, for the Motion itself indicates that the action filed in Prince Georges County, Maryland was an equity action to enjoin the defendants and compel them to reconvey the land in question to the plaintiff. The Circuit Court of Prince Georges County, Maryland did dismiss that action solely on the grounds that the plaintiff had an adequate remedy at law.

3. The defendant, through counsel, states in the Motion To Dismiss that there are other reasons why his Motion should be granted. No other reasons are known to the plaintiff, and such could not be properly urged upon the Court without plaintiff having received due notice thereof with ample time for the plaintiff to respond in opposition to the same.

B. Austin Newton, Jr.
Attorney for Plaintiff

[Certificate of Service]

[3]

PROCEEDINGS

THE DEPUTY CLERK: No. 9, Melaro versus Mezzanotte.

ARGUMENT IN SUPPORT OF MOTION

MR. BONNETT: If it please Your Honor, my name is Reuben Bonnet. I appear on behalf of the defendant in this action here.

The facts very, very briefly are that the plaintiff, if it please Your Honor, filed a suit in Prince Georges County, Maryland, against the same parties involving the same property in question except in one case in Prince Georges County, they asked for equitable relief there.

They maintained, if it please Your Honor, that they had a contract with all the defendants whereby the defendants were going to convey or sell to the plaintiffs the property in question and they asked the court

at that time to compel specific performance of the property.

THE COURT: Your motion is predicated upon the ground of res judicata; is that correct?

MR. BONNETT: That is correct.

THE COURT: What do you say to the objection that was made that there was no dismissal or disposition of the case in Prince Georges County on its merits but rather that the action was dismissed solely on the ground that there was [4] an adequate remedy at law and the proceeding in Prince Georges County was in equity?

MR. BONNETT: If it please the Court, there is a rule of law -- and I might cite it to Your Honor right here -- that he is wrong with regard to that because he had his option at that particular time in Prince Georges County to do one of two things: To appeal the decision -- which, incidentally, he did and subsequently the appeal was dismissed -- or in the alternative, he could have changed the Prince Georges County form of action to one dealing with a legal question rather than an equity question.

I would like to call your attention, if it please Your Honor, to a rule of law which is the test of the identity of a cause of action, and this is found in AmJur and it is stated as follows:

"If the same facts or evidence would sustain both causes of action, the two are considered the same within the rule and judgment in the former shall bar the subsequent action" -- citing Bittner v. West Virginia-Pittsburgh Coal Co., 15 Federal 2d 652, and numerous other cases.

Now, it is contended, if it please Your Honor, in Section 366 of AmJur, it says that the application of the doctrine of res judicata to the identical causes of action [5] does not depend upon the identity or differences in the forms of action -- citing the above case -- and then it continues as follows: "A party cannot, by varying the form of action, escape the operation of the principle that one and the same cause of action shall not be twice litigated."

Now, the action, if it please Your Honor, is the identical thing when you come down to it. It so happens that in the District of Columbia right here, as my associate mentioned to Your Honor a moment ago, we have abolished two different forms of action. If the suit were filed in the District of Columbia, the equity court would have a perfect right if not to have conveyed the property in question to have granted judgment for damages, and so forth. However, in Prince Georges County, they have still the equity court and the law court out there.

But the test, if it please Your Honor, on the whole thing is: Is it the same parties? That is number one. We have to agree that it's the same parties in question. There is no doubt about it. Is it the same subject matter? Yes, it is the very same subject matter. It's just a question, if it please Your Honor, he in turn now is attempting to do in this court what he didn't do in the other court.

I say that he waived it. He had a right to appeal. The appeal was dismissed out there and as a result thereof, if [6] it please Your Honor, the doctrine of res judicata will apply and as such, he has no right to be in this court at this time.

There must be a finality of litigation and we certainly have litigated it out there and now we are faced with the very same prospect, if it please Your Honor, of being in this court.

Thank you for your attention.

ARGUMENT IN OPPOSITION TO MOTION

MR. NEWTON: If the Court please, my name is Austin Newton. I represent the plaintiff in this case.

It would appear what Mr. Bonnett has actually said to the Court is that he is relying not so much on the doctrine of res judicata as on the doctrine of equitable conversion.

Of course, under the latter doctrine, it is true that a party is held accountable not only for those actions which he did plead but those

which he could plead. But Mr. Bonnett best answered the plaintiff's dilemma: In a common law jurisdiction, we cannot do that. The court did not have before it the question of an action in damages because it could not. In this Court, it could have.

Of course, we were estopped from proceeding with the dual remedy in this Court. The proper remedy, naturally, in this situation, if the Court looked at the pleadings, would have been that the plaintiff could have prevailed in specific [7] performance if this is what he decided he wanted, but that --

THE COURT: Was this a final disposition of the case in Prince Georges County?

MR. NEWTON: It was a final disposition of the case for specific performance only, Your Honor.

THE COURT: And is it considered a disposition on the merits?

MR. NEWTON: On the merits of that cause of action only.

I would say, Maryland counsel and myself spent a number of months in trying to confer with this plaintiff who is in and out of this jurisdiction, Your Honor. He is one of the top jet pilots out there, I believe they call him, in our defense system and he is all over the world. As a consequence, we spent much time in debating whether we could proceed with our damage action in Prince Georges County but investigation seemed to bear out that our only chance for service at this time on these defendants would be in the District of Columbia and, hence, the action was brought here.

But we could not proceed, as Mr. Bonnett indicated. There are a number of -- as the Court, I am sure, is aware -- essential elements to constitute the defense of res judicata and one of them is missing here, namely, the cause of action. We could not proceed with the same cause of action for an [8] action in damages. As the Court indicated in Prince Georges County, he thought our exclusive relief was in that field.

THE COURT: Why couldn't you proceed with the damages there?

MR. NEWTON: Well, of course, we would have had to file another action, Your Honor, and we couldn't have filed another action there. We would have preferred to because the litigation could have been calendared more quickly, but service on these three defendants could not be obtained there. That is what our investigation brought out. It could only be obtained here where their offices are. We did proceed against one of the defendants who we felt had the power to reconvey his property to specific performance. We tried to proceed against the others.

THE COURT: Was Fort Washington Estates, Incorporated a named defendant in the Prince Georges action?

MR. NEWTON: Yes, Your Honor, it was. I understand now, investigation seems to bear out that that company may be defunct.

THE COURT: Very well.

Anything more?

REBUTTAL ARGUMENT IN SUPPORT OF MOTION

MR. BONNETT: Only one thing, if it please Your Honor.

The parties, as Mr. Newton very candidly conceded to Your Honor, [9] were the same, the subject matter was the same and I think that Your Honor did put the shoe right on the nail, and that is: Was the disposition in Prince Georges County a final thing on the merits? And it was, if it please Your Honor.

In other words, they are estopped, they are barred out in Prince Georges County. Now, even though they had originally the election of remedy to file out there or here whether in law or in equity, they chose the former jurisdiction. They got kicked out. Now, they are attempting to relitigate the very same identical thing here.

Thank you, Your Honor.

ORAL RULING OF THE COURT

THE COURT: The Court will grant the motion to dismiss.

MR. BONNETT: Thank you, Your Honor.

(Whereupon, the hearing on
motion was concluded.)

[Filed October 26, 1964]

ORDER

Upon consideration of the Defendants' Motion to Dismiss filed in the above-entitled cause on the grounds that this suit is res judicata and upon the Opposition to said Motion filed by the Plaintiff and after oral argument in Court, it is by the Court this 26th day of October, 1964,

ORDERED that the Motion to Dismiss the above-entitled case be hereby granted and that the Complaint filed herein be and the same is hereby dismissed on the grounds of res judicata.

Edward A. Tamm, Judge

[Filed November 25, 1964]

NOTICE OF APPEAL

Notice is hereby given this 25th day of November, 1964, that

HORTEN J. M. MELARO

hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 26th day of October, 1964 in favor of Matthew N. Mezzanotte, et al against said plaintiff, Horten J. M. Melaro

/s/ B. Austin Newton, Jr.

Attorney for Plaintiff

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,100

HORTEN J. M. MELARO,

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*On Appeal From the United States District Court
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for the District of Columbia Circuit

FILED APR 5 1965

Nathan J. Paulson
CLERK

REUBEN BONNETT

425 - 13th Street, N. W.
Washington 4, D. C.

Attorney for Appellees

(i)

APPELLEES' STATEMENT OF QUESTIONS PRESENTED

In the opinion of the Appellees, the following questions are presented on appeal:

1. Is the instant case *res adjudicata* because the Appellant filed a suit in the Circuit Court of Prince Georges County, Maryland, against the Appellees, Equity No. B-8678, which case asked for specific performance and/or damages?

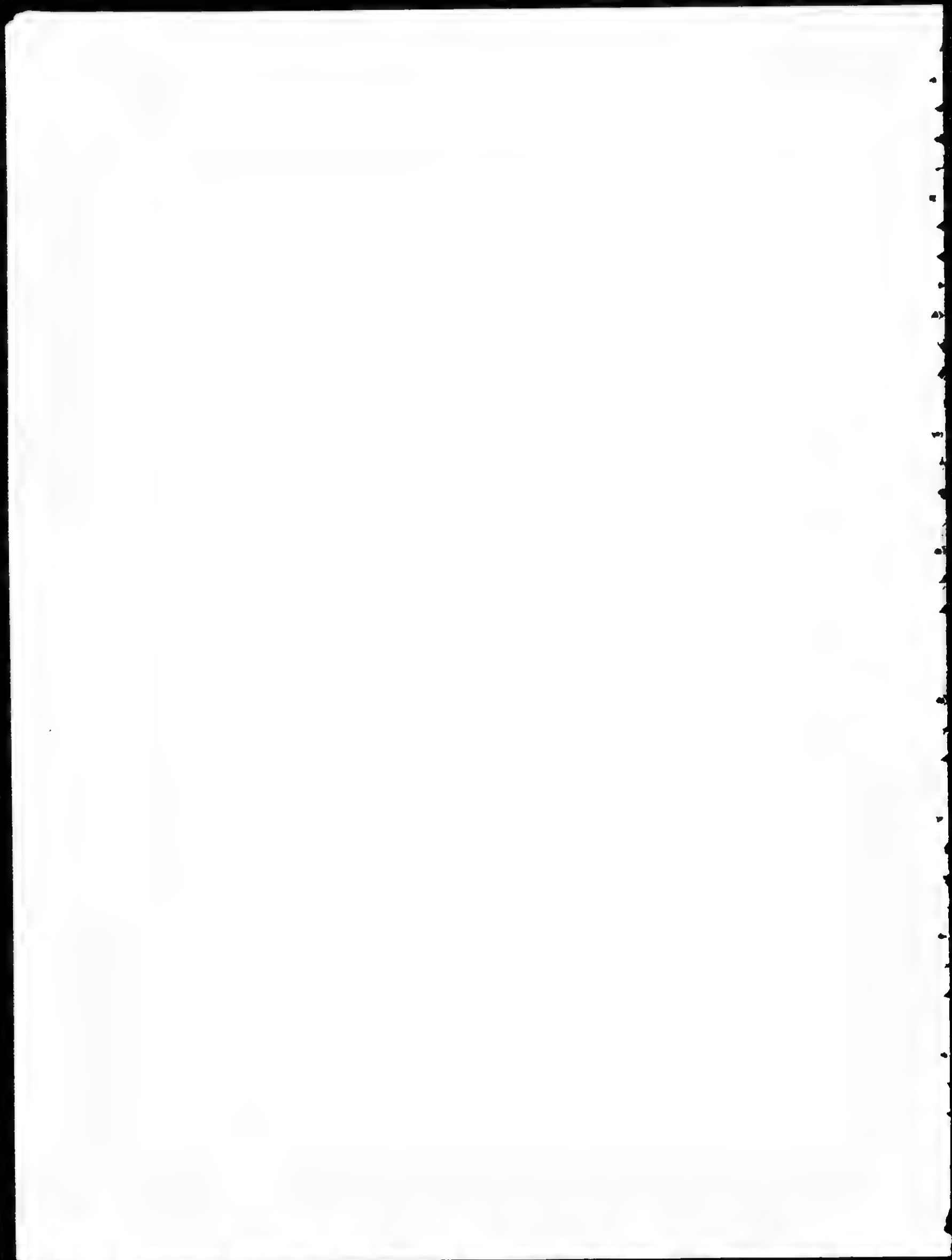
2. Was the Court correct in dismissing said action because the facts in both cases were the same, the parties and conditions in both cases were the same, and a final judgment was rendered in the equity suit in Maryland?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,100

HORTEN J. M. MELARO,

Appellant,

v.

MATTHEW N. MEZZANOTTE

and

MEZZANOTTE & COMPANY

and

FORT WASHINGTON ESTATES, INC.,

Appellees.

*On Appeal From the United States District Court
for the District of Columbia*

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

In the year 1957, the Complainant (Appellant) visited the Fort Washington Estates Subdivision and made an offer to the corporate Defendant, Fort Washington Estates, Inc. (Appellees) to purchase a lot in this subdivision. The offer made by the Appellant was unacceptable to the Appellees, and the contract was returned to the Appellant. The Appel-

lees agreed to sell a lot to the Appellant upon certain terms and conditions which were never accepted by the Appellant, and hence no contract for the sale of any lot was ever entered into between the Appellant and the Appellees.

The Appellant mailed in to the Appellees monthly checks in accordance with his original offer to purchase, which checks were immediately mailed back to the Appellant. The Appellees failed and refused to accept these monthly payments from the Appellant since no contract was ever entered into between them for the purchase and sale of a lot in this subdivision.

The Appellant is in error when he states that an elaborate marina was constructed on the lot which he wanted or desired to purchase from the Appellees. The marina site in question was clearly defined on the plat and the lot, which the Appellant desired to purchase, was not the marina lot which the Appellant now states was constructed on the property that he desired to purchase

The Appellant filed a suit in the Equity Court of the Circuit Court of Prince Georges County, Maryland, Equity No. B-8678, seeking specific performance and/or damages in the event of failure to receive specific performance.

A Demurrer was filed to this Complaint, and the Court upheld the Demurrer. Appellant filed Notice of Appeal in the Circuit Court of Prince Georges County, Maryland, but failed to effect his appeal. Thereafter, the Appellant filed this suit in the United States District Court of the District of Columbia, Civil Action No. 2136-64. A Motion to Dismiss was filed against this action on the ground that the same subject matter had been covered in the equity suit in Maryland; and, therefore, this suit was *res adjudicata*. The motion came on to be heard on the Defendants' motion and opposition filed thereto; and by order dated October 26, 1964, the Court granted the motion dismissing the complaint on the ground that the matter was *res adjudicata* by virtue of a Maryland equity suit, Equity B-8678.

STATEMENT OF POINTS

The sole question is whether or not the instant case is *res adjudicata* because the Appellant had filed a suit against the Defendant upon the same grounds in the Equity Court in Maryland, Equity No. B-8678.

SUMMARY OF ARGUMENT

The District Court's decision to dismiss this case was correct because the instant case was identical to the case filed by the Appellant in the Circuit Court of Prince Georges County, Maryland, Equity No. B-8678, and hence the Court found that the Appellant was estopped from filing said case on the grounds that it was *res adjudicata*.

ARGUMENT

The Appellant has stated in his Brief that the Trial Court was in error in dismissing the Appellant's case as it was not *res adjudicata*.

One of the basic factors that the Appellant has missed with regard to the entire case is that, when the Appellant filed his suit in Maryland, he asked not only for specific performance but upon failure of specific performance, that he also be granted damages. The Trial Court in Maryland dismissed this action on a Demurrer filed by the Defendant.

An appeal was taken by the Appellant in Maryland, but the Appellant failed to prosecute his appeal within the appointed time, and hence this appeal was dismissed. Accordingly, the entire action between the Appellant and the Appellees is *res adjudicata*.

In the case of *McLendon vs. McGlaun*, 60 Georgia 244, the Court stated, "The dismissal of an appeal, even on a technicality, leaves the judgment of the lower court in full force as an estoppel except where

the dismissal is for a defect in the appeal proceedings not attributable to Appellant."

The Appellant had his choice of actions. He could have elected to sue the Appellees in the District of Columbia. He chose to sue the Appellees in Maryland where he asked for specific performance and/or damages.

The basic principle of *res adjudicata* is that the facts are the same, the parties and conditions are the same, and a final judgment was rendered in the matter. Here, we submit that a final judgment was rendered against the Appellant in the State of Maryland. In the case of *Toucey vs. New York Life Insurance Company*, 102 Fed. 2nd, page 16, the Court held, "The doctrine of *res adjudicata* applies to a judgment at law even though the subsequent action is one in equity."

In 122 A.L.R., page 1415, "That, although the methods of presenting and determining controversies and facts on which they arise may differ in equity or at law, so long as the identity of the controversy can be discerned, the adjudication in one court concludes them in the other". Citing *Pomponio vs. Larsen*, 80 Colorado, page 318 and numerous other cases.

The true test of the identity of the cause of action is that, if the same facts or evidence would sustain both, the two are considered the same with the rule that the judgment in the former is a bar to the subsequent action. This is well established law and is cited in the case of *Bittner vs. West Virginia Pittsburgh Coal Company*, 15 Fed. 2nd 652 and numerous other cases. We submit that the parties are the same and the evidence in both cases is the same and, therefore, they are considered the same within the rule.

In *Freedman on Judgments*, Fifth Edition, 684, pages 1443 and 1444, it is stated, "A party therefore cannot, by varying the form of

action, escape the operation of the principle that one and the same cause of action shall be twice litigated."

The Appellant cited the case of *Tribby vs. O'Neal*, 39 App. D.C. 467. The Court there stated, "The test, we think, is whether the remedies pursued in two or more suits could have been included in one."

The Appellant has failed to state to the Court that, in the Maryland suit which was cited, damages were requested as well as specific performance; and since the Maryland suit was dismissed, it definitely would constitute *res adjudicata* and *Tribby vs. O'Neal* would not apply. In the other cases cited by the Appellant, namely, *Merrill vs. City of Wheaton*, 41 N.E. 2nd 508, again the same argument and test would be applicable, namely, damages were involved in the Maryland suit and hence the *Merrill vs. City of Wheaton* case would not apply.

It is, therefore, respectfully submitted that the lower court was correct in holding that the Appellant's Complaint was *res adjudicata* because of the prior dismissal of the suit in the Circuit Court of Prince Georges County, Maryland, and that, therefore, Appellant should not be permitted to continue his action in the District of Columbia for breach of contract and damages since all of the matters alleged in the Appellant's Complaint were alleged in the Maryland suit.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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